

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY JOHN JOHNS,

Defendant-Appellant.

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UNPUBLISHED

April 21, 2000

No. 210170

Macomb Circuit Court

LC No. 96-002546-FH

Before: Jansen, P.J., and Hood and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of third-degree criminal sexual conduct, MCL 750.520(1)(a); MSA 28.788(4)(1)(a), and two counts of fourth-degree criminal sexual conduct, MCL 750.520e; MSA 28.788(5). Defendant was thereafter sentenced to concurrent terms of two to fifteen years' imprisonment for the conviction of third-degree criminal sexual conduct and one to two years' imprisonment for the conviction of fourth-degree criminal sexual conduct. Defendant appeals as of right and we affirm.

Defendant first argues that he was denied due process by the prosecution's failure to disclose before trial that the complainant (who was fourteen years old at the time of the alleged criminal conduct) admitted to a prosecutor that she lied to the deputy sheriffs about her prior experience drinking alcohol, about whether she knew that defendant was serving alcohol to her, about the amount of alcohol she willingly consumed, about the amount of alcohol that defendant drank, about her knowledge of the alcohol that defendant purchased, and about her use of cigarettes. Defendant also contends that the prosecutor had both an ethical and constitutional duty to disclose this evidence. We disagree with defendant's contention.

"In criminal cases tried after January 1, 1995, discovery is governed by MCR 6.201." *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997). MCR 6.201(A)(2) provides that a party must, upon request, provide to all other parties any written or recorded statement by a lay witness whom the party intends to call at trial, except that a defendant is not obliged to provide his own statement. MCR 6.201(B)(1) provides that a prosecutor is required to provide a defendant with any exculpatory information or evidence known to the prosecutor. Here, the complainant's oral statement

to the prosecutor that she lied to the deputy sheriffs concerning her use of alcohol and cigarettes was not written or recorded, nor was it exculpatory. Whether the complainant had used alcohol in the past, whether she knew what she was drinking the night of the alleged incident, whether she knew how much alcohol defendant had to drink, and whether she smoked cigarettes are not issues germane to the allegations against defendant, that he committed some degree of criminal sexual conduct. Consequently, there was no obligation under MCR 6.201 on the part of the prosecutor to disclose the unrecorded, nonexculpatory statement to defendant before trial. *Tracey, supra*, p 324.

With regard to defendant's due process claim, this Court, relying on United States Supreme Court and state Supreme Court decisions, has identified three situations in which a defendant's due process rights to discovery might be implicated: (1) where a prosecutor allows false testimony to stand uncorrected; (2) the suppression of material evidence favorable to an accused where a request has been made to the prosecution; and (3) the suppression of material exculpatory evidence where the defendant has made only a general request for exculpatory information or no request at all. *Id.*; *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992).

None of these situations apply to this case. Here, the prosecutor did not allow false testimony to stand uncorrected. Further, the evidence is not material because there is no reasonable probability that the trial result would have been different had the evidence been disclosed. *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998). More importantly, the evidence was disclosed at trial through defense counsel's cross-examination of the complainant. On cross-examination, the complainant testified that she lied to the police investigators and that she was scared because she did not know what kind of trouble she would be in. Complainant admitted lying to the police about defendant buying cigarettes for her, she admitted to lying about the amount of alcohol she consumed the evening of the alleged incident, she admitted to lying about whether she recognized that defendant had given her alcohol to drink as opposed to only soda pop, and she admitted to lying that she had never had alcohol before. Thus, to the extent that defendant claims that this evidence was both material and exculpatory because it served to attack the complainant's credibility (defendant's defense at trial), defense counsel's cross-examination of the complainant brought out the inconsistencies between her statements given to the police and her trial testimony.

Accordingly, the evidence was not "suppressed" since it was ultimately brought out at trial on cross-examination. Further, the prosecution was under no statutory or constitutional duty to disclose the complainant's lies to the police concerning her use of alcohol and cigarettes. Thus, the trial court did not abuse its discretion in denying defendant's motion for a new trial on this basis. *Id.*, p 458; *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

Next, defendant argues that the admission of other bad acts evidence (defendant furnishing alcohol to the complainant on past occasions) resulted in a miscarriage of justice because the prosecutor did not establish a proper purpose for its admission, the evidence was not relevant to a fact in issue, and it was unfairly prejudicial. Defendant did not object to the admission of this evidence at trial. An allegation of unpreserved, nonconstitutional error requires a defendant to show that plain error occurred and that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even if a defendant satisfies these requirements, the reviewing court should reverse only

when the error resulted in a conviction of an actually innocent defendant or when an error seriously affects the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id.*, pp 763-764.

We find that no plain error occurred. The consumption of the alcohol by the complainant was part of the events that transpired during the evening and lead up to the alleged incident, thus, contrary to defendant's assertion, is part of the incident such that it is *res gestae* evidence. *People v Sholl*, 453 Mich 730, 740-742; 556 NW2d 851 (1996); *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).

Moreover, it appears from the record that defense counsel did not object to the evidence because it was part of the defense strategy. During opening argument, defense counsel informed the jury of the use of alcohol during the evening. Defense counsel attacked the complainant's credibility by noting the differences in her trial testimony and her statement to the police by focusing on what she told the police concerning her prior use of alcohol and her consumption of alcohol during the evening of the incident. Further, defense counsel asserted in both opening and closing arguments that the complainant was lying and used the inconsistent testimony concerning alcohol to attack her credibility. Under these circumstances, no plain error occurred.

Lastly, defendant contends that the trial court erred in instructing the jury that this other acts evidence could only be used to show that defendant specifically meant to allow the complainant to consume alcohol, and that such error compounded the erroneous admission of the other acts evidence concerning defendant supplying the complainant with alcohol on occasions before the alleged incident.

The trial court instructed the jury in the following manner:

You have heard evidence that was introduced to show that the Defendant committed improper acts for which he is not on trial. If you believe this evidence, you must be very careful only to consider it for a certain purpose. You may only think about whether this evidence tends to show that the Defendant specifically meant to allow [the complainant] to consume alcohol. You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the Defendant is a bad person or that he is likely to commit crimes. You must not convict the Defendant here because you think he is guilty of other bad conduct. All the evidence must convince you, beyond a reasonable doubt, that the Defendant committed the alleged crime or you must find him not guilty.

In reviewing the trial court's instructions as a whole, we find that there is no basis for reversal because the instructions adequately protected defendant's rights by fairly presenting the issues to the jury. *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997). Although it might have been preferable for the trial court not to have included the sentence that the jury could think about whether the evidence tended to show that defendant specifically meant to allow the complainant to consume alcohol, taking the jury instructions as a whole, we believe that the trial court was simply trying to inform the jury that the providing of alcohol could not be used to convict defendant. Because the import of the court's

instructions was that the evidence could not be used to show that defendant was a bad person or was likely to commit the crimes or to convict defendant because he was guilty of other bad conduct, the court's instructions to the jury were proper and adequately protected defendant's rights.

Affirmed.

/s/ Kathleen Jansen

/s/ Harold Hood

/s/ Kurtis T. Wilder